DOCUMENT RESUME

ED 138 418 RC 009 874

AUTHOR Deloria, Vine, Jr.
TITLE A Better Day for Indians.
INSTITUTION Field Foundation, New York, N.Y.
PUB DATE 77
NOTE 38p.

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS *American Indians; *Attitudes; Beliefs; *Change Strategies; Classification; Courts; Criteria; Decision Making; Definitions; Equal Protection; Federal Aid; *Federal Government; Federal Programs; Land Acquisition; Laws; *Policy Formation; *Recognition; Standards; Tribes
IDENTIFIERS *American Indian Claims

ABSTRACT

Vesting Congress with implied powers over American Indians produces attitudes and assumptions which are extremely influential. There are seven such controlling assumptions: Congress is presumed to act in good faith toward Indians; the belief that past policies were based upon some intelligent criteria that incorporated an understanding of conditions, the approval of Indians, and a farsighted intention of Congress; the paternalistic assumption that the solution of Indian problems is a simple matter of adjustment of already existing programs; the perception of Indian lands and communities as laboratories which can be used to test various theories of social engineering; the Federal government can use Indian lands at its discretion; sanction of the privilege of the Federal establishment to avoid difficult decisions; and tribal rights are nuisances that can be abated as need be. In view of the impact of these assumptions, the following specific recommendations are offered to affect fundamental shifts in direction, simplification of complex problems to their elemental factors, and expansion of the manner in which Indians believe they perceive themselves today: uniform recognition of Indian communities; clarification of tribal membership; a standard definition of the status of an Indian tribe; creation of a "Court of Indian Affairs"; arbitration of long-standing Native claims; rejuvenation of the Indian land base; and universal eligibility for government aid based on need. (JC)

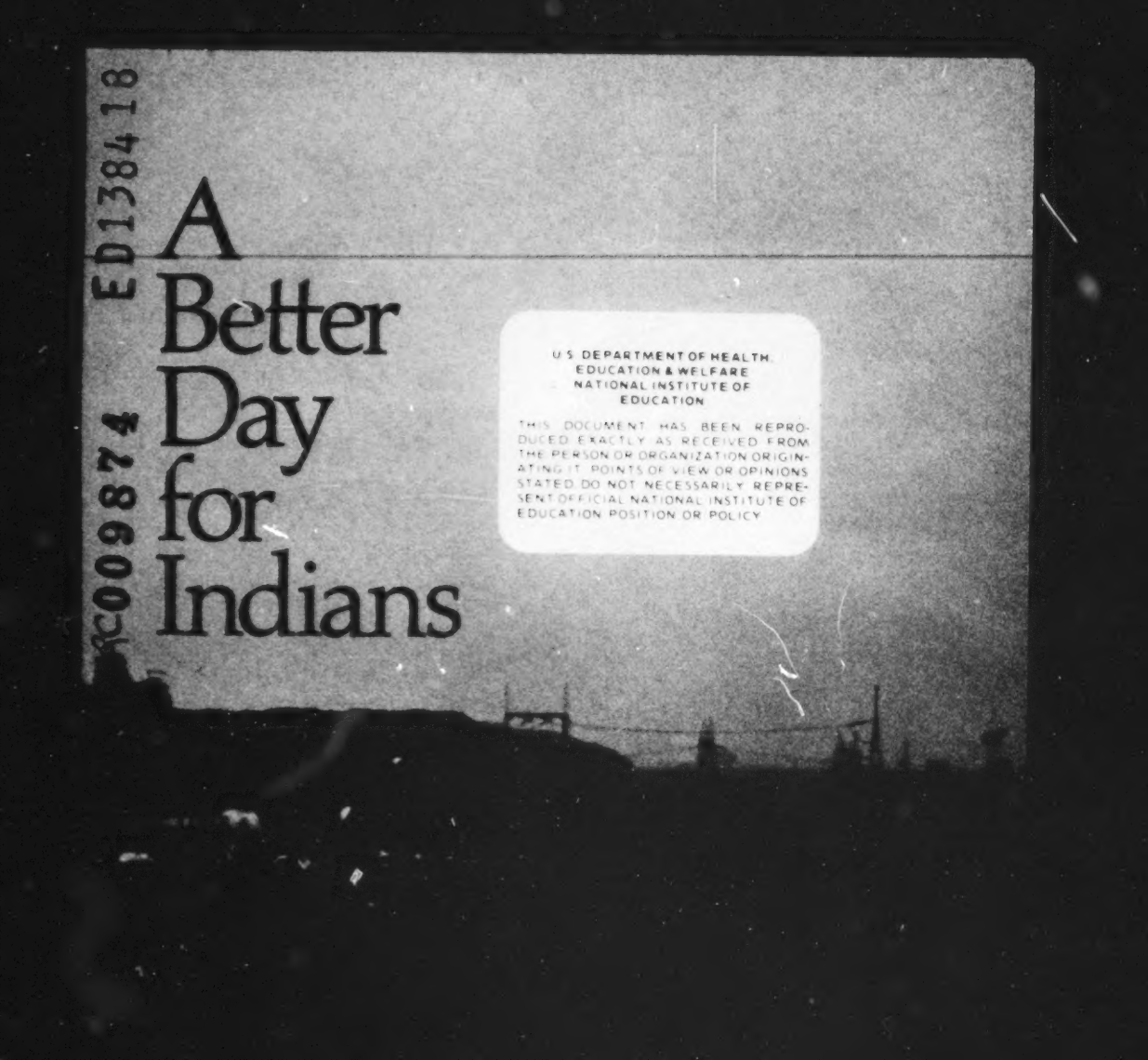
****
* Documents acquired by ERIC include many informal unpublished *
* materials not available from other sources. ERIC makes every effort *
* to obtain the best copy available. Nevertheless, items of marginal *
* reproducibility are often encountered and this affects the quality *
* of the microfiche and hardcopy reproductions ERIC makes available *
* via the ERIC Document Reproduction Service (EDRS). EDRS is not *
* responsible for the quality of the original document. Reproductions *
* supplied by EDRS are the best that can be made from the original. *
****

ED138418
RC009874

A Better Day for Indians

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY



JUN 1977
ERIC
RECEIVED

The photograph on the cover was taken by Mike Clark in August 1975 at the Four Corners power plant in New Mexico, on the Navaho reservation. This huge plant, owned by a consortium of utilities under the name Western Energy Supply and Transmission Associates (WEST), generates electricity for transmission to Phoenix, Los Angeles, and some other southwestern cities. The rider is Mrs. Emma Yazzie, whose life-long home has been at this place, and who has refused to move away, with her sheep, goats, horses, and family. Surrounding her is the strip mine which fuels this plant, operated by a subsidiary of General Electric.

A BETTER DAY FOR INDIANS

Vine Deloria, Jr.

The Field Foundation
100 East 85th Street
New York, N.Y. 10028

1977

Foreword

This is the first of several papers the Field Foundation intends to publish during 1977. All will be discussions of national questions. They will also be expressive of certain interests and concerns of the Foundation's programs.

We are very glad that Vine Deloria, Jr. consented to write for this series. A lawyer, leader, and philosopher, he has been a devoted interpreter of Indians to themselves and to others. We hope that what he has to say in these pages will be read widely, and in Washington closely, because these are deeply thoughtful conclusions about an ancient and often wronged people, and their place on this continent.

Leslie W. Dunbar
Executive Director

Contents

	Page
Introduction	4
The Seven Controlling Assumptions	7
Can Indian Communities Have a Good Life in America?	12
Recommendations	17
1. A Uniform Recognition of Indian Communities	17
2. A Clarification of Tribal Membership	21
3. A Standard Definition of the Status of an Indian Tribe	25
4. The Creation of a "Court of Indian Affairs"	26
5. Arbitration of Long-standing Claims	28
6. Rejuvenation of the Indian Land Base	30
7. Universal Eligibility for Government Aid, Based on Need	32
Conclusions	34

INTRODUCTION

American Indians are the oldest and most persistent of all the racial and ethnic minorities in our society. Their origin on this continent is still a matter of serious debate. Scholars conjecture that they, or their progenitors, arrived on the North American continent approximately 35,000 B.C., having crossed the land bridge of the Bering Straits during a period of relative warmth when Asia and North America were connected. Most Indians reject this conclusion, for their own legends describe different origins, some holding that there were migrations from both East and West, some maintaining origin in an underground world and arrival in North America by a journey from that underworld. Regardless of the theories, it is certain that most Indians see themselves as the original inhabitants of the continent and trace their land claims to the creation of the world. This point is important because traditional Indians have frequently boycotted federal programs, have frequently rejected settlements in the Court of Claims, and have refused to participate in tribal governments, because of belief in the divine origin of the tribe and a feeling that participation in federal programs or recognition of American claims against the tribe violate their traditions.

The relationship of American Indians to the rest of American society has traditionally been understood in the context of the settlement of the interior of the continent. The introduction of European culture and legal systems, in the outcome principally English, meant a radical change in the conception of land by both Indians and non-Indians. The European nations claimed sovereignty over the lands of non-Christian people discovered by their explorers. Sometimes these claims were reduced to legal titles by conquest, but more often the European nations treated formally with the tribes, assuring them that acceptance of political control by European nations over them would not interfere with their traditional ways of life except insofar as it meant the cession of lands for settlements.

Following the Revolution and the withdrawal of English armies from the Atlantic seaboard, the United States asserted its claim to sovereignty over the interior of the continent. American jurists adapted the doctrine of discovery under which European nations had claimed land to accommodate the new situation. Whereas European nations had recognized a valid title to land in the Indian tribes and had asserted claims against other colonizing powers, maintaining that their title was that of first purchaser with the exclusive right to extinguish a once-valid Indian title to lands, the new United States government substituted a new theory, one which denied any ultimate land title to the Indians but

which, in return, recognized the various tribes as political entities with sufficient political existence to sign and keep treaties.

The number of treaties actually signed with the Indian tribes cannot, however, be determined with any certainty. Nearly 400 were ratified; an equal number were not. Traditional Indians still see in the treaties a recognition of their status as nations and rely upon them as the basic documents which describe the status of the tribe and the powers which the United States can exercise over them. The Indian understanding, for the most part, was one of listening to and remembering the intangible promises made by treaty commissioners, and the treaty was viewed as a sacred covenant between two nations; it was basically a religious, not a legal, document. Thus Indians stubbornly anticipate affirmative action by the United States in resolving their difficulties and many Indians do not see the necessity of forcing the United States, through legal action, i.e., litigation, to perform on its promises. The more acculturated and mixed-blood Indians rely on treaty arguments when it is politically feasible, but prefer to assert citizenship rights at other times. Citizenship rights derive from a conglomerate of statutes and interpretive case law generated over the past two centuries.

Can parallels be drawn between Indians and other racial minorities? In general, whites of the mainstream tend to lump Indians together with other racial minorities and to pretend that common solutions can resolve all problems of minority groups. Historically, this commonality has not been practiced. Indians and blacks were differentiated in the Constitution, blacks occupying a quasi-legal status incorporating property and human attributes, Indians being conceived of as "tribes" with whom the United States would conduct commerce. In the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution blacks were granted rights and citizenship status, but even the Fourteenth was at pains to distinguish Indians. Indians were specifically excluded from citizenship, entering that status at first by individual treaty provisions and later in a general act unilaterally applied to all Indians.* Whereas blacks have generally been conceived as a "class," Indians have sometimes been seen as a "dependent, domestic nation," small, and incapable of making critical political decisions; sometimes as "wards."

Orientals and Mexican-Americans have quite different historical ties with the United States than blacks, ones that more closely resemble Indians'. Immigration laws and treaties specifically restricted the entrance of Chinese, Japanese, and other Orientals into the United States until well into the present time. They were, therefore, often non-citizen aliens in

*Indian Citizenship Act of 1924, 43 Stat. 353

the same sense that Indians, born on a reservation of a tribe with treaty relations with the United States, were aliens, incapable of voting and possessing vested property rights. Insofar as the federal government refused to recognize the outstanding treaty rights of Mexican-Americans and Orientals, they have shared experiences in common with Indians. An ideological similarity thus exists, which may at some time in the future issue in a political coalition or at least in a perceived sense of loss that results in a concerted effort for reparations.

But the major difference, legally, between Indians and other racial minorities, lies in the interpretations which courts have given to the powers of Congress with respect to them. Constitutional protections are explicit for every group except Indians, since all others share now in a general citizenship status. But *implicit* powers of Congress govern Indians, powers derived by inference from the Congressional responsibility to regulate trade with the Indian tribes. Being implicit, Congressional power to affect Indian lives and property is rarely balanced by an articulation of Congress's responsibility or limitation of its powers. The extent of federal involvement with the tribes thus turns on what courts find "reasonable" or "anticipated" in the legislation at any particular point in American history.

Indians have, therefore, never received basic legal rights in the American political system. They are, in some legalistic sense, citizens, but at the same time, wards of the state. Even the attorneys, for example, who represent the tribes, have to be acceptable to the federal government; and rather than having Constitutional protections against the confiscation of property or the violation of civil rights, Indian complaints fall conveniently within the discretionary powers of federal employees, acting in ways that would, for other citizens, be blatant violations of legal rights, but are for Indians simply the proper exercise of trusteeship.

The Seven Controlling Assumptions

Vesting Congress with implied powers over Indians produces attitudes and assumptions which play a formative but often unnoticed role. *Perhaps the foremost* of these, and one that frequently finds expression in the decisions of the courts, *is that Congress is presumed to act in good faith toward Indians*, and its acts to be deliberately chosen to serve their best interests. This doctrine, attitude, or assumption, is so important, because it allows the federal government to disclaim any ultimate moral responsibility for its acts. Ill-conceived or badly administered policies are never traced back to their roots. The attitude is rather one of superiority, with each Congress or administration disclaiming, as it wishes, the policies of the past and advocating equally disastrous policies, always and in turn on the assumption that men of good will do and did no wrong.

A *second*, resulting from the assumption that Congress acts in good faith, is the *belief that past policies were based upon some intelligent criteria* that incorporated an understanding of conditions, the approval of the Indians, and a farsighted intention of Congress. This belief is patently false, and reference to historical conditions of Indians will indicate as much.

Indian reservations originated as the western lands were settled and the establishment of reservations was pretty much an ad-hoc process, that sought first of all to disarm the Indians and render them harmless to the waves of settlers who followed the paths of the railroads or mining rushes across the country. Marking out an area, usually a valley or desert basin, as a residence for the tribes, did not involve a commitment by the federal government to organize a community, much less thoughtful planning. Often it meant no more than restricting Indians to an isolated location by military force. Thus construction of schools, hospitals, and agency buildings, and providing an economic base for the tribe, occurred sporadically as need arose or political pressures made it imperative. (Not until the early 1960s did many reservations receive funds for construction of adequate public facilities.)

This is a convenient place to take note of the on-again off-again policies of Washington for economic improvement of Indians. Today, this is more than a burst of momentary zeal. For Indians, having in the nineteenth century been put on land desolate and unwanted are now found to be sitting atop mineral wealth desperately wanted by corporations and the consuming society.

Economic development of the reservations falls into two basic categories: industrial developments, which emphasize wage income; and development of natural resources, primarily energy reserves, which emphasizes exploitation by alien corporations under long-term leases or,

as is now being discussed, contracts for services. Schemes for bringing light industry into reservation areas have been foisted upon Indians for nearly two decades. One need only scan the accumulated press releases of the optimistic years of the 1960s to see the naivete which characterized early efforts to bring industries to remote reservations. A survey today would reveal that very few lasted more than half a decade, and one would be greatly surprised to discover any light industrial plant that began in the 1960s and is still active on a reservation today. The Fairchild factory on the Navajo reservation, which closed in 1975 following a protest against working conditions, was the last sizeable operation of those years still operating.

A related feature of the late 1960s was the development of industrial parks and motels by tribes who had been persuaded by the Bureau of Indian Affairs and Economic Development Administration that paradise lay just beyond the next project. Today, industrial parks, once filled with sewer facilities, power lines, cement curbs, and new signs, lie hidden in the weeds, baking in the hot sun in abandoned areas of southwestern reservations. Several reservations were convinced that immense crowds of tourists would invade their lands each Summer if they built motel-recreation projects near their most scenic areas. With the noted exception of the Warm Springs reservation, most of these projects have long since scaled down to a local motel used on occasion for conferences and training sessions by the tribe itself, with little or no tourism to help pay for them.

Exploitation of natural resources began early with the discovery of zinc and lead on the lands of the Quapaws, later with oil and gas in the region of the Five Civilized tribes and timber on the Menominee and Klamath reservations. Following the Second World War the exploitation of Indian mineral resources escalated, the growing urban areas of the Southwest meant additional pressures on Indian water, and elsewhere there have been conflicts over hunting, fishing, and ricing activities. There were sporadic controversies with state agencies, as natural resources grew sparse under the expanding pressures of population growth and avid consumption.

The energy crisis has only increased pressures. As royalty income or its prospects rose, tribal councils saw leasing as a source of immediate income and tended to overlook the long-term spoliation of their remaining land base and its resources. One of the main problems is the tendency of tribal governments to sell or lease energy resources for much less than worth, considered on a long-term value basis, preferring to have immediate income for present needs. Tales of corruption of tribal officials by corporate bribery are not uncommon, but cannot be taken as evidence that the white men are aiming to eliminate

Indians by robbing their resources, as many Indian radicals would have it. Recent revelations in Washington show that some corporations corrupt everyone, without discrimination as to racial or ethnic origin.

The solution to the problem of exploitation of Indian physical resources cannot be found, if the problem is conceived in isolation from the political problems on the reservations. Tribal officers need not lease coal and oil resources merely for immediate gain, but do so because no effective mechanism exists for the people to exercise deliberate and informed judgment, and to prevent such actions when in the community's interest. It is necessary to develop the political and social resources of Indian communities, prior to intelligent development of natural resources. Unless adequate expressions of tribal wishes are made possible in the political processes of tribal government, little headway can be made in resolving the many problems which the energy crisis presents to Indians.

Thus no elaborate schemes for economic development will be presented in this paper. Until Indians begin once again to conceive of themselves as communities with a political process capable of solving social problems, there cannot be a realistic approach to the solution of economic problems. If the federal government wants Indian-owned energy resources developed it should first of all give its necessary support to political and structural changes, such as this paper will propose.

Still a *third* assumption results from the paternalistic role and powers of Congress. *The solution of Indian problems is conceived as a simple adjustment of already existing programs.* Efforts at reform assume, quite wrongly, that the existing structure works, albeit poorly, and corrective measures are viewed as efficiency problems; i.e., how to deliver services faster. Never do reformers ask how programs originated, whether they are designed to serve Indians, calm the ruffled feathers of bureaucrats, or pacify angry Congressmen and their constituents. The ideological roots of many Indian programs thus remain hidden and goals become tangled between the practical needs of Indians and the political desires of non-Indians.

A *fourth* attitude of implicit powers *views Indian lands and communities as laboratories which can be used to test various theories of social engineering.* The termination of the Menominee tribe of Wisconsin, for example, was thought by its initiator, Senator Arthur Watkins of Utah, to be a testing of the principles of economic Darwinism. Earlier, the experiment of off-reservation boarding schools, conceived by non-Indian friends who saw cultural evolution as the grand principle of human progress, permanently oriented Indian education toward an assimilationist goal. Indian education is still basically directed toward the extinction of Indian culture since it is conceived as a means of

integrating Indians into a mythical American mainstream.

A *fifth* attitude deriving from the Constitutional theory of implied Congressional powers is that the *federal government can use Indian lands at its discretion.* Indians possessing no ultimate legal interest in their property. The construction of dams by the Army Corps of Engineers, the construction of irrigation projects on Indian lands for the benefit of non-Indian lessees and neighbors, and the general willingness of federal agencies to accommodate private interests in their exploitation of Indian lands and natural resources, all testify to the potency of this attitude. Justification of programs which are destructive of Indian lives, communities, and social values relies upon this easy belief in the benevolent exercise of the unlimited powers of Congress to use Indian properties. The public has been taught that, if "we" need more Indian land, "they" will have to be moved.

A *sixth* attitude sanctions *the privilege of the federal establishment to avoid difficult decisions.* The executive and judicial branches often refuse to enforce the legal rights of Indians, using the excuse that the Constitution has committed Indian affairs to Congress. Thus federal courts, hearing massive evidence of treaty violations by the federal executive, avoid the difficult decision of finding the United States in violation of the law by proclaiming that treaties are political matters to be resolved by Congress, which the courts must not approach. Thus it is practically impossible to get legal satisfaction from the federal government. Failure to receive just treatment creates an abiding sense of mistrust of the federal government.

A *seventh* assumption generated by the implicit powers of Congress over Indians is manifested by state and local officials, and it is that *tribal rights are nuisances, that can be abated as need be.* Most states in the west have disclaimer clauses in their Constitutions, or in the enabling acts which admitted them into the union, forbidding them from assuming control over Indian lives and properties. But local officials realize that they can, one way or another, override Indian complaints politically. Senators and Congressmen all have more immediate political relationships with their state governments and economic interests than they do with Indian tribes. Thus state officials easily subvert Indian programs by pressuring their Congressional delegation in a variety of ways, if not through their own state courts.

The historical propensity of federal courts, the executive branch, and succeeding Congresses to assert that an implicit power to govern Indians resides in the legislative branch, has meant the development of a condition in which neither the Indians nor the bureaucracies understand the dimensions of the federal trust relationship. Interpretations of "the law" change with great frequency and no

one understands what is fundamental in the legal relationship. Trust can mean overbearing supervision or an arms-length observation of conditions, and consequently nearly every course of action, whether benevolent or detrimental to Indians, is subject to endless critique and controversy, and typically fails to accomplish its goals.

The present situation is further complicated by two contemporary factors which will make any true solution difficult to achieve: (1) Indian politics; and (2) the Abourezk Commission. In a sense, we always have these two factors with us; i.e. there has always been politics within Indian ranks—though not perhaps as destructive as at present—and there nearly always seems to have been some study commission. This latest commission, co-chaired by Senator James Abourezk of South Dakota and Representative Lloyd Meeds of Washington will, in this writer's opinion, add little or nothing to the failed recommendations of previous commissions. From its beginning, as a Congressional response to the Wounded Knee occupation, it has been embroiled in Indian politics. It has been maneuvered, as well, by the survival instincts of B.I.A. officials.

Well-intentioned people have been active in it, but the likelihood is that it will recommend outmoded policies and programs already suggested, in their main outlines, by several commissions of the past. Nevertheless, for years to come its work will be part of the political environment which will have to be lived with, and detoured around if real improvements are to be made.

As to Indian politics, Indians are generally conceived to be a homogeneous group but they are not. Historical friendships and enmities go back into the pre-Columbian past and every tribe conceives itself as an independent nation with a distinct history, culture, and attitude toward other nations. Only in this century, particularly with the effects of off-reservation boarding schools, have Indians perceived that they are considered a homogeneous group by non-Indians. This realization has contributed a great deal to efforts made throughout this century to unify the tribes politically. Benefits provided to all tribes in the Indian Reorganization Act of 1934 and fears created during the termination period, 1954-1964, helped to foster a sense of national unity among Indians.

A number of important Indian organizations now exist which represent different attitudes and beliefs held by significant portions of the national Indian community.

The present division of Indian people seems to fall along the lines of activism vs. conservatism, the National Congress of American Indians and National Tribal Chairmen's Association following directions set by the government quite closely, the National Indian Youth Council exercising a responsible mainstream approach to problems, and the American Indian Movement conducting militant protests against bureaucratic and tribal governments' abuse of In-

dians. The federal security agencies have harassed the leadership of A.I.M. continually in the last four years, consistently violating civil and Constitutional rights of Indians, and helping tribal politicians to beat down their political opponents by a variety of techniques. Until the federal police forces are neutralized and directed to follow the laws of the United States and the political corruption of some reservation leaders is punished, there will be no peace in Indian country.

Indian politics has made many Indian leaders willing conspirators in the violation of Indian rights. Any new federal policy for Indians must confront the particular problems of Indian organizations and must destroy the incestuous relationship which some leaders now enjoy with various federal agencies. Or else there will be no progress in Indian affairs.

For the field of Indian affairs is in absolute confusion. Interests and attitudes have become so entrenched in the minds of both Indians and whites during the course of this century that any substantial changes are likely to be rejected by irrational attacks on the motives of the reformers. Indians have continually demanded a streamlining of the Bureau of Indian Affairs and reformers have frequently taken these demands to heart. But whenever a definite plan is suggested, always some Indians combine with career employees of the Bureau to sabotage, preferring generally simply to exchange one set of federal employees for others who might be more compliant with the wishes of the tribal politicians.

The fatal mistake of both the Johnson and Nixon administrations was their yielding to the temptation to use plans for B.I.A. reform as a means to bolster their public image with both Indians and non-Indians. Announcements of structural changes in the B.I.A. always triggered an irrational response from the Indians, and much of that trauma can be traced to bureau employees on the local level who actively stirred up sentiment against the change. But local people recognized the window-dressing efforts and resentment built, culminating in the sack of the headquarters of the B.I.A. in November 1972. Whatever changes may in the future be made or contemplated should be accomplished as silently as possible, over a prolonged period of time, so that they do not become political footballs and fodder for sensationalizing in the media.

Congressmen harangue against the expanding role of government and the Bureau of Indian Affairs is often a target of their gibes. But the stirring speeches against big government, whether originating from Democrats or Republicans, hide a basic fact of political life, particularly in the western states. The Bureau of Indian Affairs provides an important federal payroll for many small cities in the West, and the removal of an office or a sudden cutback in its func-

tions will almost surely provoke the wrath of a Congressional delegation. It is estimated, for example, that the area office of the B.I.A. in Aberdeen, South Dakota, generates a payroll of $2 million a year for that city. Any significant reduction in this source of funds, even if it benefits Indians, will produce an immediate protest by local citizens, each of whom, individually, may despise Indians and demand that they be taken off the federal dole.

A decade ago Indians had few opportunities to exercise responsible professional functions. People believed that Indians were "good with their hands," and programs and employment opportunities reflected this belief. In the 1960s a new belief arose, that Indians could administer programs better than whites because they knew their own communities better. Administrative ability counted for less than blood quantum when many positions were filled. The catastrophic record of Indian organizations in the private area, in reporting their expenditures, performing administrative tasks, and planning the scope and direction of programs, indicates that this belief is false. It has led to waste and useless expenditure of time and energy. A large number of incompetent Indians now occupy positions in the federal government, often alongside incompetent white veteran civil servants, having received their appointments during the years when blood was a priority item in hiring. Any fundamental attempt to grapple with problems will involve a deliberate, steady, and prolonged contraction of the number of employees, including Indians, working in federal Indian program. The major thrust of change should be to eliminate incompetent people, whether Indian or white, and this may involve the dismissal or replacement of some politically protected Indian appointees; but it must be done.

The favorite device of the federal establishment in recent years has been to underfund a popular program, and then make a great number of applicants eligible for the available funds, thus demonstrating need and popularity of the program. But a large number of applicants for small sums of money enables administrators to exercise dictatorial powers over recipients of the program, encourages cronyism, and creates mistrust by disappointed applicants. Communities wishing to receive funding must often conform to informal requirements devised by bureaucrats, must hire consultants recommended by federal employees, or must subcontract with designated institutions and people with whom the federal administrator often has, at least, sentimental ties. Housing and economic development contracts often depend upon the subcontractor who actually performs the services and not the needs of the tribe or the feasibility of the project. *If there is to be fundamental reform, the number of programs must be greatly reduced, they must be adequately*

funded with a minimum of red tape, and they must be very tightly monitored.

All of these considerations must be taken into account when we begin to discuss the present situation of American Indians, the factors that inhibit constructive change, and the manner of initiating reforms. Government funds have been used to purchase the silence or support of tribal officials. Congressional careers have taken priority over the conditions of poverty in many communities. Indian political leaders have been allowed to exploit their own people in exchange for their cooperation. All of these things speak to a basic lack of a moral standard in the field of Indian affairs. This situation can be remedied by a strong president, exerting moral leadership and administering justice evenly.

Few administrations have been able to effect any fundamental changes in the conditions of American Indians. The "War on Poverty" served to distort and overemphasize practices that were already plaguing Indian communities; and while bricks-and-mortar projects accomplished physical change, the moral and intellectual climate of Indian tribes, in my opinion, declined significantly during this period. Government projects often became personal projects of Indian politicians, and concern for the people which had marked other eras of Indian communal existence virtually vanished in the avalanche of consultant fees.

The last administration to institute basic structural reforms was the New Deal of Franklin D. Roosevelt. Prior to and since the New Deal, it is difficult to identify any administration that assisted Indians. Therefore a new administration is faced initially by an attitude of uncertainty and suspicion among Indians, regardless of their seeming enthusiasm.

The enduring atmosphere of the first term of Franklin D. Roosevelt was not simply its morality nor even the expectations it created. It also expressed a definite analysis of the nature of the federal-Indian relationship. Roosevelt's Indian Commissioner, John Collier, understood the nature of Indian life better than any previous or succeeding Commissioner, Indians included. He sought to bring the various strands of the relationship within one comprehensive and consistent policy by advocating a restoration of traditional forms of self-government for the Indian people. He was perhaps a generation too late to restore totally the traditional virtues of Indian life to people who had already experienced two generations of bureaucratic exploitation and assimilationist educational policies. But his attempt to develop Indian communities as viable political entities can be recaptured through the actions of a determined administration.

The Indian Reorganization Act, while rejected vehemently at the time, has been sentimentally understood by Indians as an effort to ensure them self-government. This goal has

been acceptable to Indians since that time, even though it has not been achieved. Traditional Indians have been widely excluded from participation in tribal political affairs, partially through their own sense of identity and partially because the mixed-blood, more assimilated Indians have been better able to understand and operate tribal governments. If traditional life cannot be restored, communal life can still be transformed, so that Indians can have a cultural context within which the best parts of their traditions can be realized.

I shall, therefore, concentrate recommendations on specific items of reform that can be initiated within an administration's life and which, taken together, would constitute a contemporary parallel to the reforms of the New Deal. These reforms, for the most part, are not headline-gathering changes, but fundamental shifts in direction, simplifications of complex problems to their elemental factors, and expansions of the manner in which Indians believe they perceive themselves today.

RECOMMENDATIONS

1. A Uniform Recognition of Indian Communities.

A continual controversy has existed with respect to the number and identity of Indian communities eligible for federal services. The Indian Reorganization Act was designed to reconstitute all the identifiable Indian communities as federally recognized tribes, allowing them a maximum amount of self-government, and encouraging them to achieve economic and cultural independence from the federal government. The Indian communities in the eastern United States were considered eligible to receive the benefits of the Indian Reorganization Act and some bureau personnel visited them to begin the process of organizing them as federal corporations. Travel funds became exhausted, criteria for recognition became confused, priorities shifted as the Second World War approached, and they were left to their own devices.

In recent years these eastern communities have once again approached the federal government in an effort to gain the legal rights which they have long been denied. They have been shunted aside with a variety of excuses and delaying tactics, and treated as if they had no Indian heritage at all. From the beginning of the federal-Indian relationship it was the custom of the United States to provide social services to the Indians who gathered near forts and agencies, whether they had signed a treaty or not. The present requirement of "recognition" is a relatively recent phenomenon, and originates in administrative timidity rather than statutory law or Congressional policy. It must be eliminated because it is discriminatory and has no sound basis in either law or traditional practice.

The first important act providing services to Indians, the Act of March 30, 1802, authorized the president, acting on behalf of the United States, to perform certain services to Indians as follows:

> Sec. 13. And be it further enacted, That in order to promote civilization among friendly Indian tribes, and to secure their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit.

All Indians were included in this provision and eastern Indians were the chief beneficiaries of it. At that time the western tribes had not yet come into prolonged contact with the United States. There was no effort to exclude any Indians in this legislation, and there should be no effort now to exclude eastern Indians in the administration of federal programs.

Bureau of Indian Affairs personnel

have argued that only the "recognized" tribes with whom they have developed a recent (and incestuous) relationship should receive federal services. In the prolonged litigation between the Sioux Nation and the United States this very point came into question, and the Court of Claims left no doubt how the statutory history of "tribes" was to be interpreted:

> In statutes enacted and in the treaties made subsequent to the Act of August 7, 1789, and to the present time, these officers and employees engaged in the administration and enforcement of laws, treaties, and regulations, have been considered and recognized by the United States and the Indians as officers and employees of the Government; and the Agency facilities, equipment, and supplies have likewise been regarded as obligations of the Government either as expenses necessary and incidental to fulfillment of the obligations assumed by the Government under treaties and acts of Congress, or as necessary and incidental governmental expenses in the discharge by the United States of the obligations assumed as a party to the various treaties or in its sovereign capacity as the guardian or trustee for the Indians, to protect them through the enforcement of all federal laws and regulations.
>
> * * *
>
> In 1822, 3 Stat. 679, Congress abolished the Trading Houses and thereafter, as had been the case before, officers in the Military Service of the War Department, known as Indian employees, maintained posts or agencies at various places among the Indian tribes. *This, for the most part, was true whether the tribes were, at the time, in treaty relations with the United States or not.**

This general policy had been affirmed and interpreted in the *Sandoval* case in 1913 when the Supreme Court commented:

> Not only does the Constitution expressly authorize Congress to regulate commerce with Indian tribes, but long-continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection *over all dependent Indian communities within its borders*, whether within its original territory or territory subsequently acquired, and whether within or without the limits of states.**

Legislation of major importance passed by Congress in this century also emphasized the universal nature of federal services for Indians. The Snyder Act of 1921 which gave general responsibility to the Bureau of Indian Affairs to provide services to Indians without reference to specific treaty items, is phrased as follows, directing the Secretary of the Interior to:

> . . . direct, supervise, and expend such moneys as Congress may from time to time appropriate for the benefit, care, and assistance of the Indians *throughout the United States.****

Sioux Tribe of Indians v. *U.S.*, 64 F. Supp. 312, 325 (1946). Emphasis added.
**U.S. v. *Sandoval*, 231 U.S. 31, 45–47 (1913) Emphasis added.
*** Emphasis added.

The Johnson-O'Malley Act, the primary educational legislation of the New Deal era, similarly authorizes the Secretary of the Interior:

> . . . in his discretion, to enter into a contract or contracts with *any State or Territory* having legal authority to do so, for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, *of Indians in such State or Territory*, through the qualified agencies of such State or Territory . . .***

It has thus been the intent of Congress to provide federal services to *all* Indians, according to their needs, and in accordance with the federal responsibility for dependent Indian communities.

The present posture of the B.I.A. and the N.C.A.I. and N.T.C.A. is that only "recognized" tribes be provided services. They cite no major legislative or judicial interpretations which would exclude eastern Indians from services, relying primarily upon the traditional practices which have developed since the Second World War. "Recognition" is not an absolute demarcation of Indian ancestry or rights, nor is it a practice which ceased with the Indian wars of the last century. A partial listing of those tribes that have received federal recognition only in this century would include:

1900—Los Coyotes
1902—Fallon Paiute
1903—Fort McDowell
1907—Santa Rosa, Cocopah, Laytonville
1908—Morongo, Colusa
1909—Torres-Martinez
1910—San Pasqual, Fort Mojave, Lovelock, Tuolumne
1911—Seminole of Florida
1912—Skull Valley, Fort McDermitt
1913—Summit Lake, Soboda, Hannahville, Forest County Potawatomi
1914—Kalispel, Camp Verde, Goshute, Mille Lacs Chippewa
1915—Fort Independence
1916—Shivwits
1917—Papago, Kaibab, Fort Yuma, Battle Mountain, Dresslerville, Reno-Sparks Colony
1918—Mississippi Choctaw
1921—Mission Creek
1928—Koosharem
1930—Ely Colony
1934—Burns Colony
1935—Yavapai
1936—Bay Mills, Yerington
1937—Keweenaw Bay, Prairie Island, Stockbridge-Munsee
1938—Elko Colony, Yomba, Big Cypress, Lower Sioux, St. Croix, Upper Sioux
1939—Flandreau Sioux, Mole Lake Chippewa, Puertocito
1940—Carson Colony, Duckwater, Ruby Valley, XL Ranch.
1941—South Fork
1944—Shoalwater
1946—Catawba
1950—Ramah Navajo
1962—Wisconsin Winnebago
1970—Nooksack

1972—Payson Apache
1975—Sault Ste. Marie

Reviewing this listing, and recalling such tribes as the Menominees who have recently been restored to federal services, it is not difficult to determine that so-called "federal recognition" is a bureaucratic catchword designed to divide Indians from each other on the basis of a false criterion of Indian identity. In recent years the Lumbees of North Carolina and the Stillagamish of western Washington have attempted to get full federal recognition. When the Lumbees legislation came before Congress, other Indians, most particularly the National Congress of American Indians, attempted to block it. In 1976, the Tulalip tribe of Washington opposed the efforts of the Stillagamish to get its eligibility clarified.

All of the arguments advanced by the B.I.A., the N.C.A.I., and the Tulalip tribe are frivolous and demeaning. Most of them project a shortage of federal funds caused by the admission of new groups to federal services. The criteria alleged as distinguishing marks of Indian identity, if applied justly and consistently to existing federal tribes and individuals, would decimate the ranks of the Indian community. A majority of the officers of the N.C.A.I. do not speak their own tribal languages and have mixed Indian blood. The Tulalips are in much the same condition. Demanding, therefore, that the Lumbees and Stillagamish meet standards which they themselves cannot meet is hardly a safe argument to make.

There is an additional consideration in the case of the Lumbees. They have been accused of having black ancestors, indicating an attitude of racial discrimination among the opponents of Lumbee recognition. Several other tribes have notably mixed ancestry, although not necessarily black. No Indian tribe today can claim a pure blood stock, as if this requirement necessarily guaranteed Indian-ness. This reason for opposing the recognition of the Lumbees, therefore, is discriminatory, simplistic, and without precedent in Indian policy, and against the basic values of both Indians and non-Indians.

A policy of full services to all dependent Indian communities would immediately eliminate present discriminatory practices. It would simplify eligibility requirements and, in that respect, cut administrative costs. Most of all, it would force the now-eligible tribes to share the resources of the federal government with all intended recipients, restoring to them the opportunity to practice the Indian tradition of sharing with the less fortunate.

Such a policy would be rational and just, but it would be politically controversial for a time. And herein lies the challenge to a new administration. Can it break with discriminatory practices of the past and create a new, simple, and comprehensible

Indian policy in spite of temporary controversies? Can a new administration bring justice to all Indians in the face of criticisms which will be brought by a select group of Indians?

2. A Clarification of Tribal Membership.

Traditionally it has been the prerogative of Indian tribes to establish their own membership. This principle of self-government has had a sporadic history, however, and cannot be said to have been universally practiced at any time in American history. Prior to the establishment of formal legal relationships with the United States, tribal membership was a function of clans and families, and adoption ceremonies many times brought new members into a tribe, often to replace people killed in war. No tribe is genetically pure, now or at any time in the historical past.

Under some of the treaties annuity rolls were created, in order that the government could efficiently distribute goods and money due the tribes. When allotments were given out, many tribes would have a roll made up which contained the names of all those people the community regarded as its members. In some treaties mixed bloods were distinguished from the rest of the tribe and their allotment deeds often were phrased in such a manner as to allow them to sell their lands quite easily. With each organization and reorganization of tribal governments, membership rolls became increasingly important as a means of identifying those eligible for federal services. They were often used to determine if the federal agent had the right to lease certain lands, or whether or not the children of a mixed marriage should be regarded as Indians for educational purposes.

John Collier attempted to bring together all the various types of tribal membership during the Indian Reorganization Act meetings. He regarded those people as Indians who still maintained a semblance of traditional culture or who had definite Indian ancestry. At a number of meetings, traditional Indians refused to accept Collier's definition of an Indian, maintaining that only tribal members who had kept their lands should be considered Indians. When formal tribal constitutions were adopted a curious mixture of Collier's definition and the traditional conceptions was often used to determine tribal membership. In many instances, people of little Indian blood were made full members of tribes, in other instances people of substantial Indian blood were excluded from tribal membership.

Since the adoption of the Indian Reorganization Act, tribal govern-

ments have had control of tribal membership rolls and many of these now reflect the political structure of the reservation community rather than lineal descent from the original tribe members. Termination for many tribes meant sharing a large money settlement and tribal membership was conceived as a property interest rather than a social or cultural commitment. Tribal officials, frightened at the prospect of termination, or desirous of obtaining as much money as possible from the settlement, sometimes admitted relatives and friends in large numbers and excluded people of opposite political persuasion. Eligibility for federal services such as educational scholarships, health care, and small business loans has become an important benefit of tribal membership. People with no logical or personal involvement with a reservation community have often shared in services by virtue of enrollment, depriving or shortchanging needier tribal members of services. A great deal of the present corruption of governmental services can be traced to this propensity to include predominantly white relatives on the rolls of some tribes. A cursory glance at the list of scholarships made by each area office every year will reveal a substantial number of non-reservation home addresses and a frequency of certain family names. An investigation of the percentage of Indian blood among these scholarship recipients might prove enlightening.

The successful conclusion of claims against the government has usually meant a per capita distribution of award moneys. This requires the updating of tribal rolls, and, depending upon the date of the claim, new and old tribal rolls differ considerably. Thus, for example, claims for the Five Civilized tribes, if figured on a pre-Civil War basis, would include only people without black ancestors; if on the basis of post-Civil War claims, the membership would include people of black ancestry, the slaves of the Five Civilized tribes having been made citizens of the tribes in treaties following the war. Claims of other tribes might be distributed on the basis of the original tribal roll prior to the I.R.A. or the tribal roll created by the newly authorized I.R.A. tribal government.

Some reservations were originally established for classes of Indians, such as "fish-eating" tribes of the Pacific Northwest, or for the tribes of a certain region. The San Carlos Apache reservation in Arizona, for example, was simply a gathering place for many small Apache bands rounded up in the wars with the United States. Over a period of time these reservations might be named after the tribe that inhabited the most prominent settlement, as, for example, at the Quinault Reservation in Washington which has seven tribes on it but has the Quinault tribe living at the agency headquarters at Taholah. The Confederated Yakima tribe, for another Washington example, originally contained people from

many small bands, but they all became Yakimas in the eyes of the Bureau and are today so regarded.

In general, tribal groups have been fair about their rolls and have allowed people of various tribal backgrounds to become members. But there are definite examples of discrimination present in tribal rolls also. Government boarding schools have contributed to the confusion of rolls in a unique way. Young people who attended often married people of other tribes, giving their children a claim to membership in more than one tribe, or often eliminating their children from enrollment in either tribe by failing to meet particular tribal requirements. Some people today have such a varied background of tribal ancestry that they may be seven-eighths Indian blood but of less than the necessary amount of any tribe to warrant membership in it.

The termination of some tribes has been interpreted by the B.I.A. as eliminating that quantum of Indian blood represented by the terminated tribe from consideration when determining eligibility for federal services. Thus a person with one-half Klamath blood and one-eighth Warm Springs blood becomes ineligible for federal services and membership in either tribe, but is in fact more Indian in blood and appearance than a person of one-eighth Indian blood enrolled on another reservation. The injustice of this confused system of defining tribal membership is apparent. Some tribes, to avoid such problems, simply enroll the children as possessing that quantum of Indian blood which the parents represent without determining individual tribal percentages.

On the other hand, reorganization of some tribes has led members, aware of the one-fourth blood quantum requirement for some federal services, to change the blood quantum for their own convenience, making everyone on a roll at a certain date a "full blood," thus preserving for another generation federal eligibility for their children and grandchildren. To take an example, one can trace the present membership of the Quinault tribe backwards using government records, and discover that many of its present members have a mere trace of Indian blood, their quantum having been raised several times since the turn of the century in order to keep them eligible for federal services.

The Osage Tribe of Oklahoma had its rolls closed in 1906 and its mineral estate distributed in the form of "Head-Rights" to its existing membership. Persons inheriting the Headrights were tribal members, those not inheriting were not tribal members. In the course of years many Headrights, being property interests, passed to people of little or no Indian blood and a substantial number of people of Indian blood, inheriting no Headrights, became legally non-Indians. There is a particular injustice in this situation because in addition to the wealth which Osage Headrights assure an indi-

vidual, he receives eligibility for additional rights and services which he does not usually need. By the same token, persons of predominantly Osage blood, and without income from Headrights, may be denied any federal services whatsoever.

Some tribes trace descent along the father's line and others along the mother's. It is possible to have a full blood Indian who is ineligible for tribal membership along either his father's or mother's sides, who, if the situation were reversed, would have been eligible for membership in two tribes.

With all of this confusion, it is a rarity for a tribe to have a complete roll. Elections in some tribes are highly informal affairs, where by means of a shouting match within a community hall eligible voters are determined. The approval of tribal constitutions, amendment of them, and acceptance of claims settlements, all depend largely on the voting of tribal members. Many actions taken in the past by tribal governments have not been legal actions because the tribe has in fact no reliable roll to figure its membership or to figure the necessary 30% who must vote to make the election a legal one. In cases where a tribe wishes to amend or abolish its constitution, and the most prominent case occurred during the Wounded Knee occupation in 1973, petitions containing names of tribal members have been denied validity on the grounds that they did not represent the necessary percentage of the membership, the decision coming from the Interior Department which fully knew that no adequate roll existed which could possibly be used to determine the proper figures and names.

The present membership of most Indian tribes is a result of fortuitous circumstances, a dash of federal record-keeping, political favors among tribal members, and irrational administrative decisions made by federal employees. To accuse eastern Indian communities of lacking formal tribe rolls is, in a sense, to accuse them of failure to engage in immoralities and illegalities. The solution to this problem is obvious and simple, although controversial.

A high priority should be the preparation of adequately documented rolls for every tribe. Scholars can be engaged by the federal government or by the tribe, and rolls can be composed which reflect the historical circumstances of each tribal situation. If the criterion for membership remains still at one-quarter of Indian blood heritage (though why is such a criterion necessary at all?), all federal and private records can and should be used to create a careful and accurate roll of tribal membership.

Completion of the rolls could be followed by the issuance of roll numbers using a standardized system capable of being handled by computer.

Tribes should be encouraged to issue their own tribal identification cards which could be used to verify hunting and fishing rights, jurisdic-

tional disputes, and eligibility for tribal programs. Tribal elections would require the use of tribal roll numbers and would achieve a far greater consensus of tribal desires than the present ad-hoc methods of arriving at decisions. The present popular slogan in Indian country is the "protection of tribal sovereignty," which must remain somewhat of a mystery without tribes being able to make an accurate count of their membership.

Such a program, again, will not be popular initially with some Indian political leaders. Some of those have depended on the lack of accurate rolls to maintain themselves in office. The establishment of accurate rolls will eliminate their ability to manipulate elections. Some, no doubt, will complain that establishing an accurate roll interferes with the established right of an Indian tribe to determine its membership. In recent years this doctrine has been breaking down. The application of the 1968 Civil Rights Act to tribal governments has increased the pressure to open membership to Indians on the basis of more reasonable criteria, as tribal membership is seen more and more as a property right rather than a citizenship status. But continued deprivation of the rights of individual Indians by tribal governments using the shield of tribal sovereignty is much more destructive of Indian communities in the long run than revision of the rolls.

The Indian exclusionary stance is very peculiar. The Jews, rather than eliminate people over the centuries, have gone out of their way to ensure that their culture, traditions, and membership have grown, by adopting an inclusive, and accurate, rendering of the membership of their communities. To date Indians, their eyes on college scholarship, oil royalties, and special privileges, have taken the reverse tack, eliminating people unjustly from participation in the affairs of their communities. The morality of this issue, like the morality of a universal federal recognition of all dependent Indian communities, makes it a difficult short-term political problem but a necessary one to meet, if solutions to Indian problems are to be found.

3. A Standard Definition of the Status of an Indian Tribe.

Beginning with the landmark decision, *Cherokee Nation v. Georgia*, Indian tribes have been understood in a variety of ways. They are sometimes considered "dependent, domestic nations," and at other times called "wards" of the government. Case law gives equal weight to both theories and thus Indians are always in a state of confusion about the status of their

tribal governments. When it is convenient for the government to declare them "dependent, domestic nations," thereby escaping liabilities for actions it has encouraged or forced a tribe to take, it does so. When the government wishes to exert total control over tribal communities it characterizes tribes as its "wards," depriving the communities of any voice in their lives. States frequently take advantage of this situation, pretending that tribal governments are vestiges of the past or that they are really social clubs with few political or self-governing powers.

Almost every area of political and property rights is affected by these nebulous definitions. Nor is all the confusion caused by the failure of Congress to define adequately the status of a tribe. Some tribes have fewer than 100 members and a great many have lost most of their original land base, rendering it difficult in either case to conceive how they could exercise any significant degree of political sovereignty. Indians badly need contemporary definitions. An omnibus bill containing comprehensive definitions of the status and powers of a "tribe," a "band," a "community," and a "nation" of Indians would clarify this situation.

Different categories of political existence could be described which would provide a measure of self-government, exemption from onerous or restricting interference by state governments, and a measure of protection from the arbitrary exercises of discretionary powers by federal officials. Clear distinctions could be made among the political, municipal, corporate, educational, and cultural aspects of tribal existence, eliminating much of the confusion which now exists concerning the scope of interests that are represented in tribal government. Extensive field hearings on this subject should be held and much time and effort devoted to explaining to Indians their present situation and the benefits and detriments which could come from clarification of status.

4. The Creation of a "Court of Indian Affairs."

Most, if not all, of the legal concepts and doctrines that describe the rights and status of Indians and their tribes derive from the events and developments of American history. Forced migrations, the discovery of gold on tribal lands, the coalition of several tribes to share hunting grounds, the coming of the missionaries, and the drives for statehood in the West have all contributed to the formation of Indian legal rights. No doctrine of Indian law derives from the logical unfolding of a major legal concept. If we can identify any single concept that seems to de-

scribe the boundaries of the Indian legal situation, it might be the treaty; but even with respect to treaties, there is still sufficient latitude for state or federal courts to provide their own interpretations of historical facts and to articulate those conclusions which seem common sense or advantageous to them.

Tribes and their members seem to become embroiled in litigation which often has as its sole purpose the destruction of remaining treaty rights. In some cases, notably in the Pacific Northwest, tribes have taken the initiative in asserting the interpretation which must be given to treaty provisions. But it remains a fact of contemporary life that every year a variety of courts hear and decide cases involving not simply the rights of present tribal members, but the rights and property interests of future generations.

In order to reach a decision a court should properly consider all the evidence concerning an issue that it can adequately and conscientiously gather. When we apply this rule to Indian treaty cases we are talking about the massive documentation of the times and conditions under which treaties were signed and statutes passed. And treaties rarely receive adequate attention. Often state courts will rule in favor of state agencies without considering the treaty. Appeal to federal courts is often taken by Indians' lawyers on grounds other than the treaty, to preclude any discussion of it and its complicating history. In short, the very document that binds Indians to the United States is generally left out of efforts to define the relationship which it did much to create.

In 1946, Congress set up the Indian Claims Commission and this legislation allowed the tribes to file claims against the government that had accumulated during the previous century. Part of the authorizing legislation required that the Commission investigate the claims to determine if they were valid; the commission, for the most part, has not exercised this investigative function, avoiding the intent of Congress in establishing it. But two things can, nevertheless, be learned from its experience.

The first lesson is that one single commission was used to gather all the claims against the United States, thus eliminating the need for tribes to file in every court imaginable. The commissioners, because they had to deal with one subject matter—Indian law—have become more knowledgeable than most judges in the federal system about Indian history. Many of its decisions were just.

The second lesson is that the cases involved more than a simple reading of case law. They included reports from scholars who could present as fully as possible the circumstances surrounding each claim. The peculiarities of Indian history became an important factor in the determination of legal rights and responsibilities.

The present Indian Claims Com-

mission should be changed into a permanent court for the settlement of all suits arising from or relating to the interpretation of treaties and statutes affecting Indian tribes. Tribes would have to file suit against government and government officials—local, state, and federal—in this court and this court only. The converse would also be true. The court should have commissioners whose job would be to resolve disputes between Indians and other political entities, using both arbitration techniques and the ordinary legal procedures and rules of evidence. The court should have continuing powers of supervision for monitoring its decisions. Particularly in the field of water rights and hunting and fishing rights, such continuing supervision would be necessary.

The federal court system already has several specialized courts and commissions. Establishment of this one would eliminate frivolous or malign law suits by states and local governments, in their own courts, and therefore they might have objections to its creation; but the power of Congress to regulate commerce with the Indian tribes is paramount. The power of this court to examine the legal problems of Indians in intelligible contexts that consider all factors ought not to be opposed by the state and local governments, if they were brought to see that such a court would also eliminate longstanding problems of jurisdiction which have plagued them for many decades. Indians, once they understood the role of such a court in protecting their rights, would probably support its creation. It could be initiated without any of the other reforms that have been suggested in this paper, though it naturally complements a larger transformation of Indian affairs.

5. Arbitration of Long-standing Claims.

The creation of the Indian Claims Commission allowed Indians who had land wrongfully taken from them to file claims with the hope of recovering some monetary compensation. Behind this avowed purpose existed a more sinister goal, and that was the validating of certain land cessions which had been less than legal when they originally happened. A tribe filing a claim against the government must allege that it has had lands *irrevocably* taken from it. The Indian Claims Commission then determines the date of taking and the value at the time of taking. With lands illegally taken, however, the allegation by a tribe that the lands are lost operates as an endorsement of the loss, and an admission that money will be a just compensation. The taking of some lands was so blatantly illegal as to

preclude the use of any doctrine of law or justice justifying its confiscation. The tribes in these cases should have had the right to sue for the present title of the lands; but they did not.

At least two such cases exist today: the Black Hills claim of the Sioux Nation and the claim for a major portion of Nevada by the Western Shoshones. In both cases the treaties make it absolutely clear that the government either had no intention of taking the land or that it foreswore any further land cessions except under well-defined circumstances. Both of these cases are partially concluded in the Indian Claims Commission, and are the subject of great controversy because rulings of the Commission do not conceivably fit the historical circumstances. No amount of money can erase the feelings of the peoples of these two tribes that a great injustice has been done them.

Treaties should not, in the first place, be the subject of regular litigation because they are essentially compacts or covenants and are not intended to create specific legal rights. Most nations arbitrate their treaty disputes; they do not litigate them. Arbitration is a much more compatible form of resolving a dispute involving treaty rights and land cessions, because historical records and recollections indicate that intangible considerations were always part of the negotiations. Indians surrendered a great deal of their cultural independence with the cession of lands and the signing of treaties, and thus a considerable part of the resolution of these disputes involves an equitable proportioning of what can still be recognized, i.e. the tangible assets involved in the transactions, the cultural values and traditions having now largely been lost without an adequate means of preserving or replacing them.

Much of the continuing controversy, at least with respect to the Sioux, involves a determination of intangible treaty rights. Courts and federal officials may argue that these treaties have already been settled in the courts. But the vast majority of the Sioux feel that they were given short shrift there, and the record would seem to indicate they are right. Thus whether the courts declare the subject closed or not, dissatisfaction will continue to fester until the Sioux perceive a fair resolution in their case. Other tribes will continue to point to the confiscation of the Black Hills, or the Nevada desert, as examples of the perfidy of the white man. As long as these cases remain unresolved they will continue to poison the atmosphere in which the federal relationship is understood by Indians.

The likeliest road to solution for these disputes and others of similar nature (the present controversies involving lands in New York, Maine, Massachusetts, and Connecticut, for example), is the creation of several special commissions with the power to arbitrate.

Restoration of some of the lands

would undoubtedly be included in any equitable solution. There is already precedent for the restoration of lands illegally and wrongfully taken. Beginning in 1924 and continuing until 1937, the government provided an attorney for the pueblos of New Mexico to enable them to remove white settlers who had encroached on their lands during the preceding century. Many of these whites had as good claim to the property as do any of the people now residing in the disputed areas in South Dakota and Nevada, or in the eastern disputed lands. Yet the operation of the law, once the government had determined to resolve the dispute justly, proceeded with a minimum of violence and disruption. Similar results could be expected from a thoughtful approach to the Black Hills, Nevada, and eastern claims.

6. Rejuvenation of the Indian Land Base.

In recent years the administrations have taken a more just and realistic approach to the problem of restoring an Indian land base. Submarginal lands have been returned to tribes in Minnesota, Montana, North and South Dakota, and other states. Sacred lands such as Blue Lake in New Mexico and Mount Adams in Washington have been returned, and there has been a better spirit in the federal establishment about righting old wrongs. But almost all of the lands restored have been ones held by a department or agency of the government, which had been wrongfully taken, and which to restore needed only an administrative change within the federal establishment itself.

Of more urgency is the problem of increasing fractionation of Indian land holdings and the loss of reservation lands through forced sales. The Bureau of Indian Affairs has a negative attitude toward the consolidation of reservation lands and is out of touch with Indian desires. In a recent trip to South Dakota, Commissioner Morris Thompson apologized to the tribes for the Bureau's failure to sell their land more rapidly. The chairman of the Standing Rock Sioux informed the Commissioner that rather than desiring to sell lands, the tribes wanted funds to purchase lands, noting that 23 white ranchers on his reservation desired to sell their ranches to the tribe.

The original allotments on most reservations have long since been divided into fractional interests; several generations have passed, and the heirship problem now looms very large for many tribes. The problem has been investigated several times

by Congressional committees, but their recommendations have generally involved such complicated methods that Indians have rejected their proposals. The response of the Bureau to this problem has been to put it all on a computer. This solution has been no solution at all, for it merely seeks to record the changing of ownership patterns and not to stop their growing complexity.

The administrative costs of heirship and unconsolidated reservation lands, in terms of record-keeping, policing, zoning, allocation of road funds, and other related problems, is immense. The bureaucratic and Congressional reluctance to provide loan funds for tribes to purchase lands is based upon the belief that Indians must change their methods of land holding to conform to Anglo principles of land use. The formulas put forth to solve the land question almost always involve placing large amounts of Indian land on the open market where whites and Indians must compete for it.

Today the situation is changing, and whites in large numbers no longer seek Indian lands; instead, many want to sell their lands located within the reservations. The government must confront this new situation. In the time since the last "heirship study" (completed in the late 1950s), a substantial amount of money has been wasted in administrative expenses which could have been saved with a compensable land acquisition program. To continue things as they are will simply waste more money on enormous record-keeping while increasing the confusion regarding the consolidation of reservation lands.

The government must not allow this to remain unresolved. It can be solved through grant and loan programs, wherein the government aids in purchasing lands that would contribute to the creation of a contiguous reservation land base. Rather than spending millions of dollars annually to keep records of an eroding Indian land base, the government should begin an aggressive purchase program whereby it consolidates large tracts of land in the tribe's name.

A land repurchase program even in the amount of $100 million a year for ten years would still be a bargain. Tribal members could be resettled on the repurchased lands, and placed in a training program for farming and ranching, thus reducing the unemployment and welfare costs. There are maximum benefits to this program and minimum risks. It would, however, require a long-term commitment by the government.

7. Universal Eligibility for Government Aid, Based on Need.

The federal government provides many services for individual Indians. It provides health care, scholarships, massive amounts of money for primary and secondary education, vocational training and counseling, employment assistance, miscellaneous services such as land sales and probate of wills, and trustee functions related to natural resources and property. For these services, the Bureau of Indian Affairs spends an inordinate amount of time and money determining eligibility. Particularly in the field of education, eligibility requirements now approach the ridiculous. Indian students are given or denied educational grants on the basis of whether or not they reside on trust lands. The major task of educational counselors on many reservations appears to be driving around checking out the residences of students. The same can be said, although to a lesser degree, of people working in the field of Indian health.

Once students are enrolled in college they can, if they want to and are clever, remain there almost indefinitely, adding and dropping courses and receiving a variety of federal grants and loans. The federal educational program severely restricts entrance into college because of outmoded blood-quantum and residency requirements, but then fails to exercise monitoring functions. On the other hand, grants in some areas are far below the amount necessary to enable a student to complete college, and often the funds actually arrive long after they are needed.

If tribal memberships are updated and social services eligibility determined from tribal rolls, the massive bureaucratic structure which now determines eligibility can be eliminated. Moreover, various social welfare programs of the last two decades have brought to the general public much the same services which Indians alone used to receive. The time is coming when Indian health and educational services should become part of these programs, rather than continue in isolation. Preparing for this eventuality by transforming existing inefficient Indian programs into more effectively administered programs paralleling the national health and educational services may be the most constructive manner of bringing Indians into the larger society of common needs, without assaulting their identities.

The first step can be made with college scholarships. All Indian young people capable of benefiting from college should be eligible for post-high-school education. Sliding scale charts of college or vocational school expenses can be constructed which can provide guidelines for grants. Health services could work, as supplemental programs to existing public health, Medicare, and Medicaid programs.

Welfare and unemployment funds should be directed to the tribal governments under strict accounting. They can be apportioned to the larger tribes in block grants, and they be required to use such funds to employ people to perform social services and conservation work on the reservation. Federal monitors from the line agencies could be assigned to each reservation, in place of the present variety of social welfare workers, to check on expenditures and operations. Keeping such functions from the Bureau of Indian Affairs would help to clarify its role as protector and preserver of Indian rights. As the tribes gained in ability and self-confidence, they could assume, if they wished, the functions of land appraisal, probate of wills, maintenance of roads, and other tasks now performed by the Bureau.

CONCLUSIONS

The program outlined above is obviously an ambitious and controversial one. The traditional exercise of implicit powers over Indians by Congress is greatly reduced or disciplined by: (1) eliminating the law-created distinctions among Indian communities; (2) revising and clarifying tribal membership; (3) creating a new set of definitions of the political status of an Indian nation, tribe, or band; (4) creating a single court to handle all controversial legal issues between an Indian tribe and other political entities, wherein the proper historical and cultural considerations necessary to understand the Indian viewpoints would become part of the process of problem-solving and reconciliation; (5) arbitrating, and definitively settling, longstanding claims which have created mistrust of the government; (6) consolidating and restoring the reservation land base, thus providing a sensible and realistic basis for communal existence; and (7) providing more efficient services to individuals receiving the benefits of social programs.

Previous administrations have generally chosen to cover up federal failures, fearful that they might have to assume responsibility for past errors. They have promised generalities of reform, failed to deal with specific structural changes, and concluded their terms in office on a note of disillusionment with the conditions of Indians, which have often been worse at the end of their terms than at the beginnings. To the contrary, the New Deal, radically revising the structure of Indian affairs, is generally seen by Indians as the most successful administration in this century.

Any of the above-suggested reforms can be put into effect and the situation of Indians would be dramatically improved. But the reforms are organically related and if undertaken together (and without the usual fanfare which accompanies proposed changes in Indian affairs), within a few years a dramatic change for the better would be evident in Indian country.

The most important single element in a new administration is not the direction and programs it undertakes, but that it give to them ethical leadership. Indians have seen disregard for federal law and arbitrary discretion for too many decades. Some have come to believe that the federal government engages in a deadly game of reward and punishment, in which services and people are pawns in the manipulation of larger programs and policies. An administration which would require a just and even application of laws and a concern for communities, rather than for a group of pliable leaders parroting the government's line, would be welcomed, respected, and trusted. The moral tone set by an administration is thus as important as any changes it may make.

Vine Deloria, Jr., a Standing Rock Sioux, is one of the country's principal commentators on Indian affairs. He holds degrees in both theology and law. From 1964–67 he was executive director of the National Congress of American Indians, and is a former chairman of the Institute for Development of Indian Law. His books include *Custer Died For Your Sins* (1969), *We Talk, You Listen* (1970), and *God is Red* (1973).